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No. 80-371

IN THE

Supreme Court of the United States

October Term, 1980

PAUL P. RAO,

Petitioner,

v.

STATE OF NEW YORK.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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Questions Presented.

Petitioner filed a claim against the State of New York under §8 of the Court of Claims Act for his malicious prosecution on a two count perjury indictment which was dismissed without trial since his constitutional and civil rights had been violated due to the illegal, pernicious and outrageous, seven-month pre-investigative and subsequent five-month investigative activities of the former Special Prosecutor of the State of New York and his deputies. The questions thereby arising are:

1. Whether the state of New York can raise the *Imbler-Pachtman* defense of absolute immunity for illegal pre-investigative and unlawful investigative activities of its former Special Prosecutor whereby petitioner was, without probable cause, initially earmarked as a target of an unlawful prosecutorial scheme which intolerably involved the conceded commission of numerous crimes by the office of the Special Prosecutor for a twelve-month period and led to a Special Grand Jury proceeding that entailed petitioner's waiver of immunity and the giving of testimony because of a preplanned deception by the Special Prosecutor, all of which subsequently resulted in his being coercively threatened with a perjury indictment and arrest if he refused to equip himself with electronic recording devices to manufacture criminal charges in nonrelated and nonexistent matters as against other judges and public officials he personally knew, so that his refusal finally culminated in said perjury indictment and malicious prosecution for a period of three years.

2. Whether petitioner has a claim for compensatory damages against the State of New York for being unlawfully and perniciously investigated, threatened with indictment, arrested, indicted and maliciously prosecuted for three years with the result that his health was gravely impaired and his reputation widely defamed due to his being deprived of his constitutional and civil rights by the agents of the former Special Prosecutor of that state.

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Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

The petitioner, Paul P. Rao, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York rendered in these proceedings on June 12, 1980.

Opinions Below.

The Court of Appeals denied petitioner's motion for leave to appeal without opinion. The opinion of the Court

of Claims of the State of New York is unreported and appears at Appendix A, *infra,* pages A1 to A19. The Appellate Division, Third Department, affirmed the judgment of the Court of Claims of the State of New York at 425 N. Y. S. 2d 888, and this opinion appears at Appendix B, *infra,* pages B1 to B8.

Jurisdiction.

The judgment of the Court of Appeals of the State of New York was entered on June 12, 1980. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Constitutional Provisions Involved.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures * * *."

Constitution of the United States, Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * * without due process of law."

Constitution of the United States, Amendment XIV §1:

> "* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *."

Statement of Facts.

Petitioner is an active Federal Judge of the United States Customs Court since 1948, having been Chief Judge from 1965 to 1971.

In September, 1972, former Governor Nelson A. Rockefeller of the State of New York issued a number of Executive Orders which superseded the duly elected district attorneys, authorized the empaneling of Extraordinary Special Grand Juries for the five counties of New York City, the appointment by the Attorney General of the State of New York of Maurice Nadjari as Special Prosecutor and assistants for the purpose of investigating and prosecuting corruption in the criminal justice system of the City of New York. Several of the duly elected District Attorneys objected to being superseded by Maurice Nadjari, especially District Attorney Frank S. Hogan of New York County, who informed the Governor and the Attorney General of New York State that he would prosecute any illegal and unlawful acts committed in the County of New York by the Special Prosecutor.[1] Consequently, Nadjari commenced his illegal, intolerable and malicious activities against the petitioner in a different county, Kings County.

One Loretta Errico, who had been previously convicted for a felony, was arrested for bribery on April 3, 1973, by the New York City Department of Investigation in conjunction with the State Special Prosecutor. She was interrogated by officials from both agencies and agreed to cooperate so as to avoid prosecution. On her person was a

[1] "Hogan Again Hits Governor over Nadjari," N.Y.L.J., December 8, 1972, at page 1, column 6; N. Y. Times, October 12, 1972, at page 1, column 3.

pocket telephone book which contained many names and numbers, one of which was the name of petitioner and the telephone number of the United States Customs Court. (The telephone number was not that of petitioner's private chambers or of his non-published home number, but one which could be found in the telephone directory.) Errico falsely informed her interrogators that she was a good friend of petitioner. (The tape and transcript of her only conversation with petitioner on November 12, 1973, categorically evidenced that she had not seen him in over 40 years.) Errico untruthfully claimed that she was the godmother of one of petitioner's daughters. (This statement was admitted by her under oath during a trial of petitioner's son in October of 1977 to have been a lie.) Without verifying any of her assertions the Special Prosecutor then opted to believe Errico's final remark that she was in an ideal position to attempt to have the petitioner intercede for her in judicial matters. Thus, without probable cause, the Special Prosecutor engaged in preinvestigative activities designed solely for the petitioner.

From February, 1973 through August, 1973, Errico would either call or visit the Customs Court in unsuccessful attempts to speak to or obtain an appointment to see petitioner. Although this itself placed the Special Prosecutor on notice that she was not in fact a close friend of the petitioner, the undercover operation continued. Then on September 8, 1973, petitioner's wife died and Errico, on September 11, 1973, the day of the funeral, opportunistically called petitioner's chambers to personally express her condolences to his secretary, falsely claiming that she had been a dear friend of petitioner's wife. She again requested an appointment to see the petitioner and the secretary informed her to call back.

Aniticipating Errico's success in obtaining an appointment with her next call, the Special Prosecutor, on November 1, 1973, concocted a simulated robbery and arrest which was to be exploited by Errico when she saw the petitioner. This was done regardless of the fact that a similar scheme was concocted by the court in the case of *U. S. v. Archer,* 486 F. 2d 670 (2nd Cir. 1972), wherein the Special Prosecutor filed a brief *amicus curiae* on behalf of the chastised government.

The preinvestigative scenario called for one Stephen Wilkowski, a probationary police officer from the New York City Police Academy, to assume the alias "Vitale" and to become the purported perpetrator of a fake armed robbery against one Morton Hirsch. To manufacture this non-existent crime, the Special Prosecutor violated seven penal laws of the State of New York: falsely reporting an incident (reporting the bogus crime to a law enforcement agency knowing it to be false), §240.60; making an apparently false statement (the felony complaint misled public servants in their performance of official duties), §210.40; forgery (falsifying a fraudulent New York City Police Department record, spuriously indicating two prior arrests and one conviction for "Vitale"), §170.10; possessing a forged instrument (the New York City Police Department record), §170.25; offering a false instrument for filing (the perjurious felony complaint and fraudulent fingerprint record), §175.35 and criminal impersonation, §190.25. Moreover, all of the county judges and county prosecutors from Kings, before whom the "Vitale" case was and would be processed were never advised of the manufactured nature of the case, thereby obstructing them in their official performance of governmental functions in violation of §195.05.

On November 8,1973, one week after the pre-investigative period wherein the manufactured crime was consummated, Errico called petitioner's chambers. The secretary, recalling Errico's prior call of condolence over the death of petitioner's wife who she claimed was a dear friend of hers, made a November 12, 1973 appointment for Errico to see the petitioner. On that day, she was briefed by the Special Prosecutor's office and electronically equipped for the purpose of secretly recording her conversation with petitioner as the investigative period began.

In the five-minute conversation she had with petitioner, Errico stated that she had not seen him in approximately 40 years and falsely informed petitioner that a son of dear friends of hers was in trouble and she needed advice. Petitioner told her that as a federal judge he could not give legal advice but that his son was an attorney and if she desired to consult him, his secretary would call and arrange an appointment for her. He also stated that one should have an attorney who knows the judge.[2] Conveniently, the explanation of that remark was not recorded and these words eventually were to be taken out of context. At Errico's request petitioner's secretary telephoned his son and Errico left. This was the only time that petitioner saw or spoke to Errico; he never saw or spoke with Stephen "Vitale."

Although the tape was patently non-incriminating and clearly evidenced that Errico had lied as to her close friendship with the petitioner and her being the godmother of petitioner's daughter, the Special Prosecutor persisted in his undercover operation and sent Errico to see petitioner's son on the same day. Being electronically

[2]Articles written on the importance of knowing the judge include DeConcini, Evo, "Know Your Judge," *Case & Comment,* May-June, 1948, and Mendelson, Irving "Criminal Cases," Practising Law Institute, 1945, pages 9-21.

equipped, she consulted his son who thereafter saw Vitale and undertook to represent him. From November 12, 1973 through March, 1974, the "Vitale" case was processed through the unsuspecting criminal justice system of Kings County by unknowing prosecutors and Judges.

Then on November 13, 1973, still in pursuit of developing some criminal act by petitioner or his son, the Special Prosecutor in furtherance of his investigative scheme permitted "Vitale" to be indicted by a deceived Kings County Grand Jury on the perjured testimony of the bogus comlainant Hirsch and the pretended arresting officer presented by an uninformed Kings County Assistant District Attorney. This indictment caused the violation of four more penal laws of the State of New York: tampering with witnesses (Hirsch and the arresting officer in the Grand Jury), §215.10; perjury (testimony of Hirsch and the arresting officer in the Grand Jury), §210.15 and swearing falsely to mislead a public servant (the local district attorney), §210.10. All this illegality evidenced official misconduct by the Special Prosecutor and his agents in violation of §195.00.

Periodically, from November 12, 1973 to March 10, 1974, Errico would telephone the Customs Court being unable to speak to or see the petitioner. Toward the end of the day of March 11, 1974, petitioner's son notified "Vitale" in the presence of his law associate, Sal Nigrone, that he was withdrawing from the case since "Vitale" had demanded on that day that petitioner's son should fix the case. Petitioner's son notified the Kings County District Attorney's Office on the morning of March 12, 1974, as to the illegal demand and also notified the trial court on March 13 by a personal appearance. Petitioner's son was officially permitted to withdraw. All in the scheme by the

Special Prosecutor had also involved him in a violation of §105 (conspiracy) and a violation of criminal solicitation, §100.05.

The Special Prosecutor's original plan of enticing petitioner and his son into a substantive crime had totally failed but with pernicious tenacity Errico was sent by him to the petitioner's son's law office on March 13 and 14, 1974, to unsuccessfully urge him to continue with the case lest "Vitale's" parents do her bodily harm. Moreover, on March 13, Errico spoke to petitioner's secretary imploring her to urge the petitioner to have his son continue with the case. All of these efforts to prolong the investigative activities of the Special Prosecutor failed.

The Special Prosecutor then determined to exploit his Special Grand Jury for purposes of creating the appearance of a perjury charge in order to use the threat of a perjury indictment against the petitioner, his son and his son's law associate. Thus, in hope of commandeering them into his troops of informers, on April 8, 1974, an assistant Special Prosecutor notified petitioner's son that his appearance was needed before a Special Grand Jury in Kings County on April 10 being falsely told that his testimony was required as against "Vitale" because of "Vitale's" illegal demand upon him that he had reported to the Kings County District Attorney's Office and to the trial court. Petitioner's son's law associate, Sal Nigrone, was also requested to testify on April 12, being falsely told that his testimony was needed on April 14 as against "Vitale" since he was in petitioner's son's law office the day "Vitale" made the illegal demand. The petitioner himself, on April 15, was likewise requested to appear being falsely told that his testimony was needed on April 17 as against Errico. The petitioner, his son and his law associate all waived immunity and testified without being

told that the "Vitale" case was a hoax, that they were targets and that there were tape recordings.

On May 13, 1974, petitioner and his son were directed to appear at the office of the Special Prosecutor where they were informed by Assistant Special Prosecutor Michael Brown that unless they agreed to be electronically equipped and cooperate with the Special Prosecutor in creating cases that would be concocted by the Special Prosecutor's office as against judges and public officials they knew, they would be indicted for perjury. Refusing to succumb to such unjustifiable intimidation they were told to surrender themselves the next day at 9:00 a.m.

On May 14, 1974, petitioner, his son and law associate surrendered themselves, were taken into custody and were fingerprinted, being under a two, seven and one-count indictment, respectively. They were denied a copy of their indictments and were driven in a private police car to the police station where photograhers, TV cameras, radio and newspaper reporters had been alerted and were waiting. Afterwards, they were returned in custody and were still denied a copy of the indictment. The Special Prosecutor held a press conference and read the indictments to the reporters. Later in the afternoon, they were mugged and again were refused a copy of the indictment. Still in the custody of the detectives, they were taken before Justice Murtagh and for the first time obtained a copy of the indictment.

Legal History.

On June 21, 1974, a motion was made to summarily dismiss the three indictments in the Appellate Division, Second Department, solely on the ground of prosecutorial

misconduct. By a 3-2 vote the Court denied the motion on December 13, 1974 (46 A. D. 2d 343, 362 N. Y. S. 2d 513). However, the Court stated:

> "Such a perversion of the criminal justice system by an over-zealous prosecutor is illegal, outrageous and intolerable and we condemn it * * *. The Special Prosecutor * * * is not above the law * * *" (45 A. D. 2d 343, 347, 348).

On April 3, 1974, an appeal to the Court of Appeals was dismissed merely on procedural grounds. The Court held that it was without jurisdiction to pass upon the merits (36 N. Y. 2d 421) since the decision by the Appellate Division was an interlocutory order. Nevertheless the Court stated:

> "There are those who believe that the alleged prosecutorial misconduct * * * is so egregiously inexcusable that the criminal actions spawned by that conduct should be summarily terminated" (36 N. Y. 2d 421, 425).

On May 19, 1975, a complaint for declaratory judgment and for injunctive relief was brought in the United States District Court for the Southern District of New York. Federal Judge Lloyd F. MacMahon dismissed the complaint on October 1, 1975, as a matter of comity, holding that all claims could be raised in the State criminal courts. But Judge MacMahon said:

> "There can be no question that the defendant's conduct as Special Prosecutor in simulating the setting for the perjury indictments of the plaintiffs was foul, illegal, and outrageous."

A notice of appeal from Judge MacMahon's decision was filed in the United States Court of Appeals for the

Second Circuit on October 28, 1975. This appeal was withdrawn without prejudice by reason of a decision rendered by Justice John Murtagh on December 2, 1975, where he dismissed the three indictments. Justice Murtagh stated:

> "The main element of a perjury charge under Article 210 of the Penal Law is a 'false statement' allegedly made by a defendant. With respect to each count of the indictments, the evidence presented to the Grand Jury as to this main element of the crime is in complete violation of the rules of evidence."

On July 20, 1976, the Appellate Division in 53 A. D. 2d 904, 386 N. Y. S. 2d 441, reversed the decision of Justice Murtagh, solely because the Special Prosecutor had not been given an opportunity to be heard on the issue considered by the court in arriving at its decision. Judge Murtagh died and the indictments were assigned to Justice Leonard H. Sandler. Motions to dismiss on the grounds of legal insufficiency, defective Grand Jury proceedings and in the interest of justice were made. On March 15, 1977, Justice Sandler dismissed the two count indictment against petitioner stating:

> "* * * As to Judge Rao, it is clear that the indictment must be dismissed. The evidence with regard to him was tenuous at best, quite apart from the substantial issue raised that it did not squarely contradict his testimony (cf. *Bronston v. U. S.*, 409 U. S. 352 [1973]).
>
> "* * * Coupled with the fact that the evidence contains no intimation of any misconduct on his part, I very much doubt that the Grand Jury would have voted the indictment if the evidence had been presented properly."

The Special Prosecutor notified petitioner's attorneys that the decision would not be appealed. The other two indictments were assigned to Justice Leon Polsky who, on May 10, 1977, dismissed the one-count indictment as to petitioner's son's law associate on the basis of an unnecessary delay in the sealing of one tape which lent itself to an opportunity for tampering. Two days later, on May 12, 1977, petitioner filed a claim against the State of New York for malicious prosecution which violated his 4th, 5th and 14th Amendment rights. The claim was duly answered and the State subsequently filed a motion to dismiss or for summary judgment.

On August 12, 1977, Judge Polsky dismissed one of the seven counts of petitioner's son's indictment, refusing to re-examine the "substantiality" of the "issues" because three years had elapsed from the time of the indictment. Consequently the case of petitioner's son went to trial on October 4, 1977. After the state's case the court dismissed one count and on October 15, 1977, the jury returned a verdict acquitting him of four of the remaining five counts of perjury in the first degree. A motion was made to set aside the verdict as to the remaining count and to dismiss the indictment. The motion was denied by Justice Polsky on March 22, 1978. However, he reduced the conviction to third degree perjury holding that the testimony found to be false was not material to the Grand Jury investigation. Petitioner's son was sentenced to an unconditional discharge, and an appeal was taken.

On January 10, 1979, the motion for summary judgment as to petitioner's claim against the State of New York was granted by Judge Jerome F. Hanifin of the New York State Court of Claims. Judge Hanifin held that the "Special Prosecutor approached his task with a stunning disdain for the State's criminal justice system" and stated "that his actions in fabricating the Vitale robbery and in

making a presentation to the Special Grand Jury in almost complete disregard for the rules has been variously characterized as absolutely intolerable, pernicious, a perversion of the criminal justice system, a perversion of the rules of evidence." Yet the Court refused to recognize petitioner's cause of action, stating that "No rights of the petitioner were violated," but instead, "that the rights of every man, woman and child in the state were violated." The Court further stated:

> "It is somewhat anomalous that claimant wishes to recover damages in this Court from the citizens of this state who were, in fact, victims of the acts of which he complains. Claimant complains of police tactics and rightfully so. However, those tactics were part of an intentional plan to abuse the laws and legal system of this State. In other words, the State itself was the victim, along with its citizens and the claimant."

On February 25, 1980, the Appellate Division of the Second Department, by a 3-1 decision, dismissed the remaining misdemeanor count against petitioner's son and included in its decision a comprehensive review of all indictments. The Court stated that "vigilante justice" was "abhorrent to our concept of jurisprudence." It also noted that there was "no evidence" as to "corruption within the criminal justice system." Moreover, the Court pointed out that the Special Prosecutor "withheld * * * exculpatory tapes from the Extraordinary Grand Jury" which "corroborated" testimony before it and "contradicted" the testimony of the prosecution's witnesses. In short, the appearance of perjury was perniciously created.

The court commented on the "monstrous and patently illegal" actions of the Special Prosecutor both prior to and during the Grand Jury proceedings. It added that the

misconduct of the Prosecutor was committed in order to "satiate his appetite for indictments against [petitioner's son] and the two other defendants" [petitioner and petitioner's son's law associate]. It referred to that "misconduct" as being "calculated, insidious and pervasive." The Special Prosecutor notified petitioner's son's attorneys that the decision would not be appealed.

Then on March 20, 1980, the Supreme Court, Appellate Division, Third Department, never addressing itself to the ground upon which Judge Hanifin granted summary judgment, affirmed the decision as against the petitioner in his suit against the State, saying that the Special Prosecutor had "probable cause" to indict and enjoyed "absolute immunity." Finally, on June 13, 1980, the Court of Appeals denied the petitioner leave to appeal.

Reasons for Granting the Writ.

This petition should be granted since the questions of law which it presents are novel and of public importance. Moreover, *Imbler v. Pachtman* should be clarified in order to resolve the conflict between the District of Columbia, Second and Third Circuits, as to the test to apply to determine whether a prosecutor's actions fall within the investigatory or judicial phase of a prosecution. In *Briggs v. Goodman,* 569 F. 2d 10 (D. C. Cir. 1977), cert. denied 437 U. S. 904, the Court held that "the crucial inquiry concerns the nature of the official behavior challenged" so that the investigative function may embrace acts even when performed after the commencement of judicial proceedings. In *Lee v. Williams,* 617 F. 2d 320 (2nd Cir. 1980), the Court held that the type of the harm suffered, if of a constitutional magnitude, such as invasion of privacy, is the determining factor. In *Forsyth v. Kleindienst,* 599 F. 2d 1203 (3rd Cir. 1979), the Court held that if the prosecutorial function was intimately related to the judicial process, there would be absolute immunity.

The State of New York has permitted itself to be sued for malicious prosecution. Thus *Broughton v. State,* 373 N. Y. S. 2d 87, 37 N. Y. 2d 451, has enumerated the elements for such a cause of action: [1] a criminal prosecution instituted or continued by the defendant against the claimant (petitioner was indicted on May 14); [2] termination of the proceeding in favor of the accused (on March 15, 1977, the indictment against petitioner was dismissed); [3] absence of probable cause for the proceeding (the two decisions dismissing petitioner's indictment as well as the decision which referred to the petitioner and dismissed petitioner's son's indictment clearly substantiate this point); and [4] malice (the description of the conduct of the Special Prosecutor by all the courts as being "illegal," "outrageous," "intolerable," "monstrous" and "patently illegal," "malicious and in disregard for the rule of law," and that "transgressions were committed by the representatives of the then Special Prosecutor in order to satiate his appetite for indictments against [petitioner's son] and the two other defendants [petitioner and petitioner's son's law associate]" evidence that the actions of the Special Prosecutor, in the words of *Flaks v. Koegel,* 504 F. 2d 702, 707 [2nd Cir. 1971], were "wanton and willful" as well as "egregious or approbrious," so as to establish that the prosecutor "deliberately and with malice participated in a scheme to deprive petitioner of his rights," *Neely v. Doyle,* 403 F. 2d 123, 128 [2nd Cir. 1973]).

It is ironic that the Appellate Division, Third Department, on March 20, 1980, affirmed the dismissal of the civil cause of action by Judge Hanifin stating that if the claimant could establish "that there was not a full and complete statement of facts to the grand jury that indicted or that the prosecutor falsified evidence against the claimant or withheld information which might have affected the result" then the action would not have been dismissed.

For one month prior to the publication of that decision, namely on February 25, 1980, the Appellate Division of the Second Department, which had the criminal matter before it on three separate occasions categorically stated that based upon additional information imparted to that court "the criminal background of a principal witness for the people (before the Special Grand Jury) was deliberately concealed by the use of deceptive acts" and that "exculpatory evidence" namely, "crucial tapes" were "knowingly withheld," so that a gross and unfair deception was practiced upon the Special Grand Jury.

The Appellate Division, Third Department, did not address itself to the rationale of the decision of Judge Hanifin. The reason was obvious, for when a person is indicted he in fact suffers damages singular to him, regardless of the fact that in theory all of society is injured by an attack on the law itself. It is the petitioner who was the target of an "illegal," "pernicious," and "outrageous" scheme; it is the petitioner who was charged with a crime, arrested and mugged; it is the petitioner who was unable to perform his judicial function as a federal judge; it is the petitioner whose health was gravely ruined through angina pectoris; it is the petitioner whose illustrious reputation was defamed—it was not any other person in the state. To hold that petitioner was not damaged other than as a citizen of the State, since all citizens were theoretically damaged, defies logic.

Javert type techniques in the pre-investigative and investigative stages of a prosecution, which recklessly trample upon basic Constitutional guarantees and deliberately violate statutory laws, while intentionally ravaging constitutional rights which Americans hold most precious must not be perpetrated with impunity. To sanction such wanton misconduct would have a chilling effect on proper

law enforcement and result in the erosion of the Constitution. Thus the tort of malicious prosecution indeed protects the personal interest of freedom from unjustifiable litigation. Prosser, Torts, 4th Edition, §119. Simply stated, as the court pointed out in *People v. Rao,* 425 N. Y. S. 2d 122 (1980), "what is evident in this case is misconduct of law enforcement so calculated, insidious and pervasive as to require as a matter of due process the vacating of the indictments." Cf. *United States v. Russell,* 411 U. S. 423, 431-432. For as noted by Mr. Justice Brandeis in *Olmstead v. U. S.,* 277 U. S. 435, 485:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rule of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent leader. For good or for ill, it teaches the whole people by its example. Crime is contagious; if the government becomes a law breaker it breeds contempt for laws; it invites every man to become a law unto himself; it invites anarchy. To declare that the administration of the criminal law the end justifies the means, to declare that the government may commit errors in order to secure the conviction of a private individual, would bring horrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Significantly, the pernicious nature of the prosecution against petitioner is patently invalid when one evaluates the basis for which the preinvestigative period began. Errico, a prior felon, who had been arrested for a recent bribery, had in her possession the name and general court house number of the petitioner; all of which was obtainable from a New York Telephone Directory. Then,

based upon two falsehoods, namely her statement that she was a good friend of the petitioner and that she was the godmother of petitioner's daughter, neither of which were verified, her last assertion that she could successfully have the petitioner intercede for her in a judicial matter, was eagerly given credence. Irrespective of the fact that for a five month period thereafter, she was unable to obtain an appointment to see the petitioner, which was clear notice that she indeed was not a good friend of the petitioner, and merited verification as to her claim of being the godmother of petitioner's daughter, the bogus Vitale case was manufactured. This bogus case spawned the violation of the penal laws heretofore mentioned and was commenced three weeks after the death of petitioner's wife, which event presented an opportunity for Errico to get an appointment to see the petitioner.

Such peremptory action based on the acceptance of a report from a private citizen, can find no sanction in the prescribed powers and duties of a prosecution attorney. When a prosecuting attorney proceeds upon such a course, "he does so at the same peril as does the unofficial citizen" (see *Yaselli v. Goff,* 12 F. 2d 396, 405 (2nd Cir. 1926), aff'd 275 U. S. 503 (1927).

The Court in *Gregorie v. Biddle,* 177 F. 2d 579, 581 (2nd Cir. 1949), held:

> "What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."

The information received by Errico was "the occasion" which prompted the action taken by the defendants in

processing a sham case through the criminal justice system. However, that "occasion" was totally insufficient to justify the action taken. Moreover, even if the information was of such a character as to warrant that the "occasion" justified that some action be taken, nevertheless, there could be no justification for the nature of the very action which was in fact taken—namely, violations of the penal laws of New York State.

There can be no doubt that a state prosecutor when acting within the scope of his duties in initiating and pursuing a criminal prosecution has absolute immunity. But the Supreme Court in its most recent pronouncement as to absolute immunity held that such immunity attaches when "activities were intimately associated with the judicial phase of the criminal process" and does not relate to "these aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Imbler v. Pachtman,* 424 U. S. 409, 96 S. Ct. 984, 995.

The unique facts of the instant case specifically relate to the exception carved out by the Supreme Court in *Imbler, supra,* 96 S. Ct. at 995:

> "It remains to delineate the boundaries of our holding. As noted, *supra,* at 7, the Court of Appeals emphasized that each of respondent's challenged activities was an 'integral part of the judicial process.' 500 F. 2d at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its circuit and in some others, which hold that a prosecutor engaged in certain investigatory activities enjoys not the absolute immunity

associated with the judicial process, but only a good faith defense comparable to the policeman's. See *Pierson v. Ray,* 386 U. S., at 557, 87 S. Ct., at 1219. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under Sec. 1983 [footnotes omitted]."

Moreover, in *Imbler, supra,* 96 S. Ct. at 995, note 33, the Court held:

"We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required, constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing and evaluation of evidence. *At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court.*

Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them." (Emphasis added.)

The facts of this case unequivocally establish that the reliance by the defendant on absolute immunity is totally misplaced. The pre-investigative and investigative conduct which led to the indictment of petitioner did not involve "the initiating of prosecution" or "presenting the state's case" but instead concerned "functions of an administrator rather than as an officer of the court."

For prior to petitioner's first and only meeting with Errico on November 12, 1973, which was the initial and only contact he had relative to his indictment, "unlawful," "intolerable" and "outrageous" conduct was perpetrated by the agents of the defendant. In violation of their sworn duty to uphold the Federal and State Constitutions they engaged in transgressing the specified sections of the New York State Penal Law mentioned above. These preliminary activities as to the arrest and arraignment of Vitale, were obviously performed to create a pre-investigative tool, which could be exploited in the pursuit of an investigation of petitioner, which hopefully would lead to his indictment for a substantive crime. Obviously this illegal, pernicious and foul conduct was not an integral part of the judicial process. It was not even investigative per se, it was pre-investigative. Since *Imbler* does not cloak investigative activities with immunity, a fortiori, it does not cloak pre-investigative conduct with immunity. Therefore the defendant has forfeited the defense of absolute immunity.

After Errico saw petitioner on November 12, 1973, she called his chambers on numerous occasions being unable to speak with or see him. Then during the investigative

period between November 12, 1973 and March 14, 1974, while petitioner's son represented Vitale, the defendant engaged in additional conduct which was not part of the judicial process and which violated the penal laws of the State and the constitutional and civil rights of petitioner. In order to obtain an indictment of Vitale on November 22, 1973, Patrolman Cosgrove and the bogus victim Hirsch testified before an unsuspecting Kings County Grand Jury, without the District Attorney knowing that the Vitale case was a sham.

The actions of the agents of defendant were certainly beyond the outer perimeters of their line of duty. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F. 2d 1339, 1343 (2nd Cir. 1972). Their behavoir was obviously not within the "scope" of their "lawful authority," *Galella v. Onassis,* 487 F. 2d 986, 993 (2nd Cir. 1973), and was not an isolated incident but a persistent pattern of misconduct, *Alee v. Medrano,* 94 S. Ct. 2191, 2200. Such misconduct epitomizes that which the Court stated in *U. S. v. Classic,* 313 U. S. 299, 326:

> "* * * Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

Thus, "through the use or misuse of a power derived from a state," *Kletschka v. Driver,* 411 F. 2d 436, 448 (2nd Cir. 1969), the "defendants engaged in malicious conspiratorial action at odds with the proper discharge of their official duties" (p. 450).

The processing of the bogus Vitale case, through an unsuspecting criminal justice system, which case included an indictment based on perjured testimony before an unin-

formed Grand Jury and local District Attorney, is not the activity of a Special Prosecutor "in the performance of duties imposed upon him by law" (*Imbler, supra,* at 991). The commission of crimes by a Special Prosecutor in the pre-investigative and investigative stages, clearly establishes that which the court held in *Yaselli v. Goff,* 12 F. 2d 396, 406 (2nd Cir. 1926), aff'd 275 U. S. 503 (1927) *(per curiam),* that he "acted outside the duties which were specifically devolved upon him."

Justice White observed in his concurring opinion in *Imbler,* 96 S. Ct. at 998:

> "Accordingly, the question whether a prosecutor enjoys absolute immunity from damage suits or only a qualified immunity, depends upon whether the common law and reason support the proposition that extending absolute immunity is necessary to protect the judicial process."

Considering then the nature of the pre-investigative and investigative conduct of defendant, the claim should not have been dismissed, since as was noted by Justice White in *Imbler,* 96 S. Ct. at 1000, "it is by no means true that such absolute immunity is necessary or even helpful in protecting the judicial process." For as Justice White also stated (*Imbler,* 96 S. Ct. at 1001):

> "one would expect that the judicial process would be protected—and indeed its integrity enhanced—by denial of immunity to prosecutors who engaged in unconstitutional conduct."

Granted there is a legitimate concern that a potential charge of wrongdoing against a prosecutor would cause his "energy and attention" to be "diverted from the pressing duty of enforcing the criminal law" (*Imbler,* 96 S. Ct.

at 425), this concern is not applicable to "outrageous," "intolerable," "pernicious" and "foul" violation of numerous criminal laws.

It should be noted here, that the *Archer* decision of July 12, 1973, was published four months prior to the manufacturing of the Vitale case on November 1, 1973. The U. S. Court of Appeals for the Second Circuit in *U. S. v. Archer,* 672 F. 2d 670, 672 (1973), categorically condemned strikingly similar conduct of a less unlawful nature, holding that it "went beyond any prosecutorial role." Judge Friendly, in writing for an unanimous court at page 677, referred to the "arrogant disregard" of those who claimed that their "conduct did not infringe the rights of complaining parties"and his expressed "hope" that "the lesson" of the *Archer* case would "obviate the necessity" of future decisions was callously disregarded by Special Prosecutor Nadjari. Most significantly the office of the Special Prosecutor had appeared as *amicus curiae* in the *Archer* case and although the *modus operandi* it supported was condemned that office nevertheless repeated it four months later.

When petitioner's son had withdrawn from the case and because no substantive crime had been committed, the agents of the defendant then concocted the scheme of luring the petitioner to testify by stating that his testimony was needed as against Errico. This presented them with a two-edged sword, either threaten the petitioner with a perjury indictment so as to coerce him to assume the role of a wired informer to create matters against persons he knew, or if he should refuse, to so pervert the grand jury proceedings as to create the appearance of perjury. To accomplish this, the petitioner, when he waived immunity, was not advised that the Errico-Vitale matter was a fantasy, was not advised that he was a target of the investigation and wasnot advised that there were secret tape record-

ings. All of this was not in accordance with the concept of the Fifth Amendment as mentioned in *Stevens v. Marks,* 383 U. S. 234, 86 S. Ct. 788, 794, that the "state may not substitute for the privilege against self-incrimination a scheme * * *" so that the concurring opinion stated, 86 S. Ct. 788, 795, "a state in exacting a waiver of the privilege should turn square corners * * *."

The treachery in successfully foisting Errico upon petitioner, so that she could record his conversation for the Special Prosecutor, which would be partially presented to a subverted Special Grand Jury, has a chilling effect on the Fourth Amendment protection of verbal communication enunciated in *U. S. v. White,* 401 U. S. 475, 91 S. Ct. 1122. For the unique circumstances which led to the deceptive invasion of the petitioner's privacy in his judicial chambers, coupled with the deliberate violation of penal laws by the Special Prosecutor which preceded it, rendered those chambers a constitutionally protected area. The petitioner had a reasonable expectation of privacy from such an unjustifiable intrusion based on an unsuccessful entrapment scheme involving a consistent pattern of illegal activities and a consistent pattern of violation of the Penal Code of the State of New York by the Special Prosecutor.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals of New York.

Respectfully submitted,

PAUL P. RAO, JR.,
Counsel for Petitioner,
210 East 61st Street,
New York, N. Y. 10021

September 4, 1980.

PRESENT: HON. JEROME F. HANIFIN,
Judge

STATE OF NEW YORK
COURT OF CLAIMS

PAUL P. RAO,

Claimant

-vs-

STATE OF NEW YORK

MEMORANDUM-DECISION and ORDER

Claim # 61123
Motion # M-20647
Cross Motion XM-20717

A P P E A R A N C E S:

For the Claimant: WULF & LEVINE, ESQS.
BY: Ramsey Clark, Esq. of counsel

For the State: HON. LOUIS J. LEFKOWITZ
Attorney-General
BY: Robert G. Farrell, Esq.
Assistant Attorney-General of counsel

HANIFIN, J.

This is a motion pursuant to section 17

of the Court of Claims Act for an Order granting Claimant permission to take the examination before trial of Louis J. Lefkowitz, Attorney General of the State of New York, certain named Special Assistant State Prosecutors of the State of New York, one Joseph Phillips, not further identified, and certain individuals that the Claimant wishes to examine as witnesses, to wit: Maurice Nadjari, former Special Prosecutor and Deputy Attorney-General of the State of New York, and T. Stegman, an officer who arrested the Claimant.

The State moves for an Order dismissing the Complaint on the grounds that the Court lacks jurisdiction of the subject matter of the Claim and of the person of the Defendant, and that the Claim fails to state a cause of action. In the alternative, the State seeks an Order granting summary judgment.

At oral argument, Claimant's motion for discovery was adjourned sine die.

The facts which give rise to this Claim have been the subject of extensive court proceedings and are not in serious dispute.

In September of 1972, then Governor Rockefeller issued Executive Order No. 55 which authorized the empaneling of an Extraordinary Special Grand Jury and the appearance before that Grand Jury of the Attorney-General of the State of New York or his assistants and deputies, to investigate alleged corruption in the criminal justice system of the City of New York. In furtherance of that goal, State Attorney-General Lefkowitz designated Maurice H. Nadjari as Special Prosecutor and Deputy Attorney-General of the State of New York.

In an apparent effort to ferret out corruption, the Special Prosecutor decided to fabricate a crime to infiltrate the criminal justice system.[1]

[1] The idea apparently occurred to him after he filed a brief amicus curiae in United States v Archer, 486 F 2d 670 (2d Cir., 1972) wherein a similar scheme was condemned by the Court.

A probationary officer from the Police Academy, using the name "Vitale" was alleged to have committed armed robbery. A false felony complaint was lodged against Vitale and he was arrested and jailed pending arraignment. Bail was eventually set at $10,000 by a Judge unaware of the ruse. In an effort to reinforce the scheme, the Special Prosecutor's Office prepared and filed a false criminal record for Vitale indicating two prior arrests.

Thereafter, the Special Prosecutor sent a "Mrs. Gatti," an acquaintance of Claimant, and an undercover agent, to see the Claimant, at that time a Judge of the United States Customs Court. After experiencing some difficulty in making an appointment, Mrs. Gatti apparently did see the Claimant on November 12, 1973 and asked his help on behalf of Vitale. Unknown to the Claimant, Mrs. Gatti recorded their conversation which apparently lasted no more than five minutes.

During his conversation with Mrs. Gatti, the Claimant, among other things, suggested that Vitale

contact the Claimant's son, Paul P. Rao, Jr., a practicing attorney.

On November 23, 1973, Vitale was indicted for robbery and grand larceny by a Kings County Grand Jury which was unaware, as was the Assistant District Attorney who presented the case, that no robbery had ever occurred. Although this Court is not directly concerned with the course of the fabricated crime in the criminal justice system insofar as this Claim is concerned, it does appear that Vitale did, in fact, go to the Claimant's son and that the son represented Vitale in the contrived criminal proceedings until March of 1974 when he formally withdrew as counsel.

In April of 1974, Claimant was requested to appear before the Extraordinary Special Grand Jury which was investigating whether there had been a conspiracy to bribe a Kings County Supreme Court Justice to influence the outcome of the Vitale case.

Claimant waived immunity and testified. Mrs. Gatti also testified and the tape recording with the

Claimant was put into evidence. The Special Grand Jury knew that the Vitale case was a sham.

In May of 1974, Claimant was indicted upon two counts of perjury.

The first count of the indictment recited:

> The evidence adduced before the Grand Jury also showed that a representative of Vitale went to see Judge Rao and discussed the bail problem in Vitale's case.
>
> According to the proof, the defendant told the representative that the way to handle the bail problem was to get a lawyer who knew the judge in the case.
>
> Accordingly, it became material and necessary to question the defendant about his knowledge of, and involvement in attempts to influence the proceedings in and the outcome of the Vitale case.
>
> On April 17, 1974, the defendant appeared before the Extraordinary Special Grand Jury in and for the County of Kings, State of New York, was duly sworn and gave testimony concerning the matter under investigation.
>
> Whereupon, the defendant swore falsely when he denied that he had told someone that the way to handle the bail problem in the Vitale case was to "get a lawyer that knows the judge."
>
> Whereas in truth and in fact, the defendant did tell a certain individual that the way to handle the Vitale bail problem was to "get a lawyer who knows the judge."

The second count of the indictment re - peated the first four paragraphs quoted above and then continued:

> Whereupon, the defendant swore falsely when he testified that he never told a certain individual how to handle her problem in affecting a judge's actions on a criminal case.
>
> Whereas in truth and in fact, the defendant did advise a certain individual how to handle her problem in affecting a judge's actions on a criminal case.

Judge Rao's son and Judge Rao's son's law partner were also indicted for perjury as a result of this Vitale fabrication.

On March 15, 1977, the two count indictment against the Claimant was dismissed by the Hon. Leonard A. Sandler, a Justice of the Supreme Court.

This Claim, which was filed in the Office of the Clerk of the Court of Claims on May 17, 1977, basically alleges that the decision to investigate and prosecute corruption in the criminal justice system of the City of New York was the result of a plan on the part of Rockefeller, Lefkowitz and Nadjari to assist Rockefeller in obtaining the Republican

nomination for the Presidency of the United States and that, presumably in furtherance of that plan, the Vitale "robbery" was concocted and perpetrated on the City's criminal justice system. The Claim further alleges that the Claimant was selected as a target of the Vitale ruse because he was of Italian descent and had a national reputation as a public official. Pointing out that the Special Prosecutor's Office itself violated the law with abandon,[2] the Claimant alleges that as a result of the actions of the Special Prosecutor he has been injured in his name and reputation, suffered disrepute, disgrace

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[2] For example, perjury in the first degree (swearing falsely before a Grand Jury) section 210.15 of the Penal Law; perjury in the second degree (swearing falsely to mislead a public servant) section 210.10 of the Penal Law; forgery in the second degree (falsifying public records) section 170.10 of the Penal Law; criminal possession of a forged instrument section 170.25 of the Penal Law; making a sworn false statement in the first degree (intended to mislead a public servant) section 210.40 of the Penal Law; offering a false instrument for filing, section 175.35 of the Penal Law; falsely reporting an incident (reporting to a law enforcement agency information known to be false), section 240.60 of the Penal Law; and various misdemeanors such as false written statement, criminal impersonation, official misconduct, obstructing governmental administration, criminal solicitation, tampering with witnesses and conspiracy.

and dishonor; has been obliged to refrain from trying cases im his Court; has otherwise been injured, affecting his health; and has been up to ridicule, hatred and contempt by some of his friends, acquaintances and the public for a period of three years. He, therefore, demands judgment in the sum of $5,000,000.00 compensatory damage and $20,000,000.00 exemplary damages.

The Claimant has characterized his Claim as one for "malicious prosecution."

The complete factual background of this Claim as it appears above is not set forth in the Claim as filed. Although the Claim is 10 pages long, it does not, for example, affirmatively allege that the Claimant testified before the Grand Jury and it is silent as to the nature of the indictments handed down by that Grand Jury. The Court, however, has taken considerable liberty in stating the chronological background because it is not in dispute and has been restated on a number of occasions in judicial decisions arising out of the criminal proceeding

against the Claimant and various actions by Claimant in both the Federal and New York State courts (People v Rao, 53 AD2d 904; Matter of Nigrone v Murtagh, 46 AD2d 343, affd 36 NY2d 421; People v Rao [Supreme Ct. Kings County, March 15, 1977, SANDLER, J.]; Rao v Rockefeller [US Dist Ct SDNY, January 26, 1978, BRIEANT, J.]).

Although Claimant sought dismissal of the indictment on the ground of prosecutorial misconduct, among other grounds, Justice Sandler actually dismissed the indictment because:

> The evidence with regard to him was tenuous at best, quite apart from the substantial issue raised that it did not squarely contradict his testimony. (Cf. Bronston v U.S. 409 U.S. 352 (1973)).
>
> The two counts against him rest on the dubious assumption that a man then 74 years of age necessarily remembered, and intentionally denied, a remark in a brief conversation some six months earlier, not shown to have had any significance to him, that was preliminary to recommending a criminal case to his son. Coupled with the fact that the evidence contains no intimation of any misconduct on his part, I very much doubt that the Grand Jury would have voted the indictment if the evidence had been presented properly. (People v Rao [Supreme Ct., Kings County, March 15, 1977, SANDLER, J.], at p. 10).

However, Justice Sandler in this same decision denied the motions of Paul P. Rao, Jr. and his law partner despite the fact that they both arose from the same prosecutorial conduct.

Although he dismissed the indictment against the Claimant, Justice Sandler noted:

> It is apparent from my examination of the Grand Jury minutes that the Special Prosecutor and the Extraordinary Special Grand Jury had a reasonable basis for believing that an effort may have been made corruptly to influence the determination of the case arising out of the simulated robbery, and could have reasonably believed that each of these defendants had relevant information. It is true that the method pursued, which withheld from these defendants the true character of the Vitale case, was realistically more likely to develop charges of perjury than the information confirming the suspected corrupt undertaking, but I cannot find from the facts before me that "the proceeding . . . was designed solely, and for no other valid purpose than, to produce ... perjury." (at p 7).

The actions of the Special Prosecutor's Office in fabricating the Vitale robbery and in making a presentation to the Special Grand Jury in almost complete disregard for the normal rules of evidence has been variously characterized as "absolutely in-

tolerable," "pernicious," "a perversion of the criminal justice system," "illegal," "outrageous," and "intolerable" (Matter of Nigrone v Murtagh, supra). There is no doubt that the Special Prosecutor approached his task with a stunning disdain for this State's criminal justice system. The questions before this Court, however, are whether the actions of the Special Prosecutor's Office as they were directed against the Claimant were such as to invoke the jurisdiction of this Court and to give rise to a meritorious Claim.

The State's negative response to these questions is based, in part, on the intimately related concepts of prosecutorial and sovereign immunity.

This Court finds neither immunity an absolute bar to a Claim for antecedent prosecutorial misconduct.[3] The Court's position, following Briggs v

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[3] See this Court's discussion of these issues in Cunningham v State of New York, [Claim # 61891, Motions # M-20701 and M-21435, dated December 29, 1978].

Goodwin, 569 F2d 10, cert den____US____, 98 S Ct 3089, (and cases cited therein), is that where a prosecutor acts as a policeman, or investigator, removed from the judicial process, he can only claim the immunity of a policeman. A police investigator's immunity is only qualified, subject to the defense of good faith. He may not claim a complete defense under either of the doctrines of judicial or sovereign immunity.

However, the question remains whether the actions of the Special Prosecutor and his associates give rise to a viable Claim under the facts herein.

Although the Vitale ruse has been uniformly condemned by all of the Judges and Justices who have considered it, it is not entirely clear whether the condemnation is directly solely to the assault made on the State's criminal system or whether the condemnation includes the actions taken vis-a-vis the Claimant.

In Matter of Nigrone v Murtagh, supra, Claimant and others moved in the Appellate Division to

dismiss their respective indictments pursuant to subdivision 2 of section 149 of the Judiciary Law. After discussing the fabricated criminal case in detail, Justice Christ, writing for the majority (three Justices) stated: "In this case there has been no violation of any of the defendant's constitutional or otherwise cognizable rights." The majority then expressed the hope "that our condemnation of the prosecutorial misconduct in this sui generis case will suffice to prevent its repetition. Should the Special Prosecutor disregard the admonitions here expressed, it still remains within the executive power to take appropriate action." (46 AD2d 349-350).

Although it might be argued that there is some distinction between the Claimant's rights in a civil as opposed to a criminal proceeding, it seems clear that the three Judge majority in the Appellate Division were of the opinion that the Special Prosecutor's investigative misconduct was not such that this Claimant was damaged in any of his rights.

Their concern, was, rather, with the integrity of the criminal justice system.

However, Justice Shapiro, writing for the dissent (two Justices) concluded that:

> The majority also argues that "in this case there has been no violation of any of the defendants' constitutional or other cognizable rights," but the fact is that "the pernicious effect of the Special Prosecutor's conduct" (the majority's language) invaded not only the rights of these defendants but that of every man, woman and child in this State. (p. 358).

The precise nature of the "rights of the defendant[s]" which the dissent felt were violated was not discussed. In other words, it is not clear whether the rights of the Claimant which were violated were those rights which he shared with every other citizen of this State (to enjoy a sound uncompromised criminal justice system) or some special right that he enjoyed by virtue of his being part of the investigative ruse.[4]

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[4] But, see Rao v Rockefeller [US Dist Ct, SDNY, January 26, 1978, BRIEANT, J.] where in an action brought by Claimant under 42 US Code, §1983, Judge Brieant refused to grant summary judgment on behalf of Nadjari under the same basic facts as alleged herein because "A perversion of the State criminal justice system, to plaintiff's detriment, appears to have occurred."

In affirming the Appellate Division's denial of Claimant's motion to dismiss the indictment against him, the Court of Appeals noted that it was doing so purely on procedural grounds in that the Appellate Division's decision was not appealable at that time (citing, Matter of State of New York v King, 36 NY2d 59; 62-63). However, the Court noted:

> Moreover, in coming to that conclusion no agreement or disagreement is expressed with the view of the majority at the Appellate Division that the only remedy for alleged antecedent prosecutorial misconduct is solely by executive action. (Matter of Nigrone v Murtagh, 36 NY2d 421, 425).

The Court of Appeals did not comment on the discussion in the Appellate Division decision with regard to Claimant's constitutional or other cognizable rights.

There is no clue as to what remedies might be available if the Court of Appeals disagreed with the view of the majority at the Appellate Division with regard to antecedent prosecutorial misconduct.[5]

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[5] A number of obvious possibilities come to mind, however, such as disbarment or censure.

As previously stated, this Court has concluded that a civil action against the State of New York for damages is a remedy in a proper case. However, the Court further concludes that this is not a proper case. No matter how reprehensible the actions of the Special Prosecutor were, this Court agrees with the majority in the Appellate Division that no rights of the Claimant were violated and agrees with the dissent in the Appellate Division to the extent that it concludes that the rights of every man, woman and child in this State were violated. It is somewhat anomalous that Claimant wishes to recover damages in this Court from the citizens of this State who were, in fact, victims of the acts of which he complains. Claimant complains of police state tactics and rightly so. However, those tactics were part of an intentional plan to abuse the laws and legal system of this State. In other words, the State itself was the victim, along with its citizens and the Claimant. It is, therefore, this Court's conclusion that Claimant has not shown facts estab-

lishing a viable Claim against the State based on prosecutorial/investigative activities.

Further, the purpose of the Grand Jury is to protect citizens against oppressive governmental actions. It serves as a buffer between the State and the individual and is normally in a position to assess and evaluate the performance of a prosecutor and his fairness. Here the Extraordinary Special Grand Jury knew of the Vitale ruse and still indicted. Although it is unfortunate that they did so, it is also understandable.[6]

Finally, to the extent that the actions and decisions of Rockefeller, Lefkowitz and Nadjari were politically motivated, they were outside the scope of their employment (cf. Goodyear Aluminum Products v State of New York, 12 AD2d 692; Cunningham v State of New York, supra).[7]

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6 It is not this simple, of course, since the Grand Jury presentation itself was inherently unfair (see, People v Rao, 53 AD2d 904, dissent of TITONE,J.). Nonetheless, that presentation was absolutely immune (Imbler v Pachtman, 424 US 409).

7 In Rao v Rockefeller, supra, Judge Brieant held that such "political ambition" is not actionable, even where suit is brought directly against the actor.

In accordance with the foregoing it is

ORDERED, that the State's motion to dismiss the Claim on the grounds that the Court lacks jurisdiction of the subject matter of the Claim and of the person of the defendant be and hereby is DENIED; and it is further

ORDERED, that the State's motion to dismiss the Claim on the grounds that it fails to state a cause of action be and hereby is DENIED; and it is further

ORDERED, that the State's motion for summary judgment is GRANTED.

DATED: Binghamton, New York
January 3, 1979

JEROME F. HANIFIN
Judge of the Court of Claims

ENTER:

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

March 20, 1980 36370

PAUL P. RAO, Appellant

v.

STATE OF NEW YORK, Respondent
(Claim No. 61123)

Appeal from a judgment of the Court of Claims (Hanifin, J.), entered January 30, 1979, granting the respondent's motion for summary judgment.

The claim alleges malicious prosecution and arises out of investigations conducted by Special Prosecutor Maurice Nadjari who, in an effort to uncover political corruption, fabricated and staged a false crime or robbery. The part of the defendant was played by an undercover probation officer using

the assumed name of Vitale. The contact was a woman named Gatti who knew the claimant, a Judge of the U. S. Customs Court, slightly. The robbery charge was presented by the Kings County District Attorney's office to a Kings County Grand Jury without the knowledge of either the District Attorney's office or the Grand Jury that the crime was fictitious. Pending arraignment and indictment, Vitale even submitted to jail until bail in the amount of $10,000, as set by an unsuspecting Justice of the Supreme Court, could be furnished.

On November 12, 1973, subsequent to the felony complaint, and prior to indictment, Mrs. Gatti approached the claimant as to how Vitale could be helped in his difficulty with the law. This conversation was recorded without the claimant's knowledge. The substance of the conversation was a recommendation by the claimant that his son, a practicing New York City attorney, be contacted to represent Vitale. The son undertook the representation and succeeded in obtaining the reduction of bail from $10,000 to

$1,000. He withdrew from the case, however, when Vitale suggested it be "fixed".

The Special Prosecutor presented a charge of conspiracy to bribe a Kings County Supreme Court Justice to influence the outcome of the Vitale case to the Special Grand Jury for the Extraordinary Term empaneled to consider the political corruption cases. This Grand Jury was made fully aware that the Vitale case was a sham. In April, 1974, the claimant was called before it. He appeared, waived immunity and testified. In the course of his testimony, he was asked if he had ever told someone that the way to handle the bail problem of Vitale was to "get a lawyer that knows the judge". He denied making such a statement. He also denied telling Mrs. Gatti how to affect a judge's actions in a criminal case in an effort to aid Vitale. These denials, when weighed against the testimony of Vitale and Gatti and the tape recordings of various conversations, resulted in a two-count indictment against the claimant.

The claimant moved initially to dismiss the

indictment for prosecutorial misconduct. The motion was denied, although the conduct and methods of the Special Prosecutor were condemned as "illegal", "outrageous" and "intolerable" (Matter of Nigrone v. Murtagh, 46 A D 2d 343, 347, affd. 36 N Y 2d 421).

On a subsequent motion brought by the son's law partner, the motion to dismiss was granted as to all defendants in the interests of justice, but this dismissal was subsequently reversed on appeal for lack of a hearing and because the Special Prosecutor had not been permitted to answer the motion (People v. Rao, 53 A D 2d 904).

A subsequent motion before the Extraordinary Special and Trial Term on March 15, 1977 resulted in a dismissal of the indictment against the claimant due to the manner in which the evidence had been presented to the Grand Jury, the witnesses having been permitted to express their opinions of the truth or falsity of the claimant's testimony, and because the examinations of the witnesses consisted chiefly of leading and prejudicial questions.

On March 17, 1977, the claimant filed his claim against the respondent for malicious prosecution, the sufficiency of which is the subject of this appeal. To sustain it the claimant has the burden of showing that the criminal proceeding against him was begun in malice, without probable cause of success, and terminated in his favor (Broughton v. State of New York, 37 N Y 2d 451). That a criminal proceeding was begun against the claimant and terminated in his favor is obvious.

The determinative issue is lack of probable cause, which would permit, but would not require a jury to infer the existence of actual malice from the fact there was no probable cause to initiate the proceeding (Martin v. City of Albany, 42 N Y 2d 13, 17). It is the claimant's contention that the Special Prosecutor lacked probable cause to call him before the Grand Jury, the robbery charge being a sham, and, as a result of his testimony there, he was wrongfully indicted. The contention is erroneous. No matter how the investigation was conducted by the Special

Prosecutor, nothing he did, no matter how offensive, would license the claimant to commit perjury (Matter of Nigrone v. Murtagh, supra), and without doubt the claimant's denieal under oath of the two statements attributed to him by the other witnesses and the tape recordings supplied probable cause for his indictment.

The indictment was found by a Grand Jury that knwe that the Vitale case was a ruse. The indictment was subsequent to and independent of the proceeding that indicted Vitale, in which the claimant neither testified nor appeared. The indictment in and of itself constitutes prima facie evidence of probable cause. In order to overcome it the claimant must show that there was not a full and complete statement of facts to the Grand Jury that indicted, or that the Prosecutor falsified evidence against the claimant, or withheld information which might have affected the result (Johler v. Consolidated Laundries Corp., 54 A D 2d 632). None of these factors has been demonstrated by the claimant, no matter how reprehensi-

ble he has shown the conduct of the Special Prosecutor to have been. Significantly, the indictment judicially overcame the first challenge to dismiss it. When it was finally dismissed, the dismissal decision of Mr. Justice Sandler specifically stated that there was a reasonable basis for believing that an effort may have been made corruptly to influence the determination of the case arising out of the simulated robbery and there there was a reasonable belief that the claimant possessed relevant information. The dismissal was not based on lack of probable cause to indict, but rather, on the manner in which the witnesses were questioned and permitted to testify.

It follows that the Grand Jury proceeding which indicted the claimant was not designed solely and for no other valid purpose than to produce perjury and, therefore, the lack of probable cause is absent from the claim as a matter of law.

Furthermore, the dismissal decision having concluded that a reasonable basis existed for pre-

sentation of the case of corruption, the Special prosecutor, acting in a quasi-judicial capacity as an advocate before such Grand Jury, was cloaked in absolute immunity (Imbler v. Pachtman, 424 U.S. 409, 421-423; Cunningham v. State of New York, 71 A D 2d 181).

Judgment affirmed, without costs.

SWEENEY, J.P., KANE, STALEY, JR., CASEY and HERLIHY, JJ., concur.

February 25, 1980

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

MOLLEN, P.J., TITONE, GIBBONS and COHALAN, JJ.

THE PEOPLE, etc.,

Respondent,

-against-

PAUL P. RAO, JR.,

Appellant.

APPEAL from a judgment of the Supreme Court (LEON B. POLSKY, J.), rendered March 22, 1978 in Kings County, convicting defendant of perjury in the third degree, upon a jury verdict.

Saxe, Bacon & Bolan, P.C. New York, N.Y. (Thomas A. Bolan, John F. Lang, Roy R. Kulcsar and Louis Biancone of counsel), for appellant.

Roderick C. Lankler, Deputy Attorney-General, New

York, N.Y. (Thomas A. Duffy, Jr., and Vincent Torna of counsel), for respondent.

T I T O N E, J. Defendant-appellant appeals from a judgment of conviction, after a jury trial, of the crime of perjury in the third degree (one count). However, on appeal, the conduct of the trial and the ensuing conviction are overshadowed by the highly questionable tactics employed by the then Special Prosecutor* to obtain a seven-count indictment charging appellant, an attorney, with the crime of perjury in the first degree, and similar indictments against two other defendants. The indictments of the other defendants have previously been dismissed.

This case has a long, involved and checkered history. In the latter part of 1974, the three defendants moved in this court to have the charges dismissed upon the grounds of prosecutorial misconduct. While all three accusatory instruments were

*All references hereafter to the Special Prosecutor shall mean the prosecutor in office at the time the acts in question occurred.

sustained by a three to two vote, both the majority and the dissenters strongly condemned the tactics employed by the Special Proseuctor to obtain them (see Matter of Nigrone v Murtagh, 46 AD2d 343, affd 36 NY2d 421). In the summer of 1976, this court by a four to one vote, reversed an order of the Extraordinary Special and Trial Term dismissing the indictments and reinstated them solely on the ground that the Special Prosecutor had not been given an opportunity to be heard on the issues considered by that court in arriving at its decision (People v Rao, 53 AD2d 904).

However, developments in the law which have evolved over the past few years, and additional information imparted to this court relating to this case, not only justify, but mandate, that we review the case from its inception and re-evaluate the validity of appellant's indictment. Amongst the pertinent developments in the law are the following statements contained in two decisions of the Court of Appeals, to wit: (a) the dismissal of defendant's

appeal from this court's earlier determination sustaining the validity of his indictment (People v Rao [decided with Matter of Nigrone v. Murtagh], 36 NY2d 421, 426, supra, opn per BREITEL, Ch.J.; and (b) the affirmance of this court's determination reversing the conviction and dismissing the indictment of the defendant in People v Tyler (46 NY2d 251, 258-259).

(a) Matter of Nigrone (People v Rao):

> "Finally, no view is expressed on the issue raised by petitioner and relied upon in part by the dissenters at the Appellate Division that a perjury prosecution may not lie validly if the proceeding in which the perjury occurred was designed solely, and for no other valid purpose than, to produce the perjury. Such an issue, apart from anything else, would of necessity involve a question of fact not disposable on papers submitted on motion. In any event, the issue must be raised by defense in the criminal action and presumably would test the issue whether an oath was ever validly administered to petitioner in the proceeding in which he allegedly perjured himself." (Emphasis supplied.)

(b) People v Tyler:

"The primary function of the Grand Jury is to uncover crimes and misconduct in public office for the purpose of prosecution (see NY Const, art I, §6; CPL 190.65, 190.55). False testimony before the Grand Jury, then, especially by the holder of public office, is a grave matter affecting the public interest and the administration of justice. It is not properly a principal aim of the Grand Jury, however, to 'create' new crimes in the course of its proceedings. Thus, where a prosecutor exhibits no palpable interest in eliciting facts material to a substantive investigation of crime or official misconduct and substantially tailors his questioning to extract a false answer, a valid perjury prosecution should not lie (see Brown v United States, 245 F2d 549, 554). Since no legitimate investigatory function is discernible in questioning designed primarily or solely to support a perjury prosecution against the witness, it cannot be said that the responsive testimony, albeit false, frustrates any authorized purpose of the Grand Jury." (Emphsis supplied.)

FACTS

A.

In the spring of 1973, the Special Prosecutor concocted a simulated robbery for the ostensible purpose of infiltrating the criminal justice system

in Kings County. The scenario called for an undercover officer, one Stephen Wilkowski, who assumed the name of Stephen Vitale, to be arrested for the armed robbery of a businessman of approximately $8,200. A false felony complaint was lodged against Vitale. He was fingerprinted, arraigned, and bail was set at $10,000 by a Judge in Supreme Court, Criminal Term. The latter was unaware that the "crime" and ensuing proceedings were all a ruse. The Special Prosecutor's office also fabricated a false criminal record for Vitale which indicated that he had two prior arrests.

Thereafter, the Special Prosecutor directed Loretta Errico to contact appellant's father, Judge Paul P. Rao of the United States Customs Court. Mrs. Errico, who had been arrested for bribery, and who thereafter agreed to cooperate with the Special Prosecutor, was an old acquaintance of Judge Rao, but had not seen him in 40 years. She visited Judge Rao in his chambers on November 12, 1973. She urgently requested Judge Rao to help Vitale with respect

to his trouble with the law. At the suggestion of the Special Prosecutor, she falsely told Judge Rao that Vitale was a son of two friends of hers. Although apparently unaware of the "Vitale" hoax, she was equipped with a concealed tape recorder by the Special Prosecutor's office for her visit to Judge Rao's office. (She was likewise so equipped on later occasions when she visited appellant at his law office.) Judge Rao referred her to his son, appellant Paul P. Rao, Jr., a practising attorney.

The scenario then changed and the Special Prosecutor's efforts focused on appellant. Upon leaving Judge Rao's chambers, Mrs. Errico proceeded to appellant's law office and arranged to have Vitale meet him later that day. At the ensuing meeting appellant agreed to represent Vitale in the pending "robbery" case. Vitale was wired with a recorder both on that occasion and at subsequent meetings he had with appellant in connection with the matter.

On November 23, 1973 Vitale was indicted for

robbery (two counts) and grand larceny (two counts) by a Kings County Grand Jury. The Grand Jury members and the Assistant District Attorney who presented the case were unaware of the contrived nature of the events unveiled at the proceeding. When Vitale failed to appear for arraignment on the indictment the cash bail posted by him was declared forfeit. Through appellant's efforts the forfeiture was revoked, the bail money was returned, new bail was fixed at a lesser amount than originally set and meaningful inquiry into whether the bail money was the proceeds of the manufactured robbery was avoided. The Supreme Court Justices before whom the bail issue was presented likewise did not know that the "Vitale" robbery case was a charade. Appellant withdrew from the case as Vitale's attorney in March, 1974. In doing so he at that time advised both the District Attorney's office and a Supreme Court Justice that Vitale was seeking to have the case "fixed."

In April, 1974 Judge Rao, appellant, and the latter's law partner or associate, Salvatore Nigrone,

appeared before the Extraordinary Special Grand Jury, at the Special Prosecutor's request. At the time that body was purportedly investigating whether they had conspired with a Judge of the New York City Civil Court and others to bribe a Kings County Supreme Court Justice to influence the outcome of the Vitale case. Unlike the situation in the Kings County Grand Jury where that body was unaware of the bogus nature of the Vitale case, the Special Grand Jury was made aware it was a sham.

Each of the three defendants testified before the Special Grand Jury under a waiver of immunity. The undercover agent, Wilkowski (Vitale), and Mrs. Errico also testified. In addition, surreptitiously-made tape recordings of conversations engaged in by all three defendants were placed in evidence.

In May, 1974, Judge Rao was indicted and charged with two counts of perjury, appellant was charged with seven counts of perjury, and Nigrone, with one count of perjury. In 1977 the indictments against Judge Rao and Nigrone were dismissed. No

appeal was taken by the Special Prosecutor's office from either order of dismissal.

On August 12, 1977 the trial court (POLSKY, J.), dismissed the fourth count against appellant on the ground that the information giving rise to the alleged perjury was derived from the unlawful use of information obtained from an unsealed tape which had previously been suppressed. As a result counts five, six and seven were renumbered four, five and six, respectively. In addition, recital of facts in each of the remaining six counts pertaining to the "hook" conversation were deleted. Appellant was found guilty, after a jury trial, of perjury in the first degree under count four of the indictment. In that count appellant was charged with testifying falsely before the Extraordinary Grand Jury that he did not help Vitale in creating a "phony" story or defense in connection with the bogus robbery case. On March 22, 1978, the trial court reduced the verdict to perjury in the third degree (a class A misdemeanor) and sentenced appellant to an uncondi-

tional discharge.

B. Presentation to Extraordinary Grand Jury

On the second occasion this case was before this court on appeal, it was demonstrated via the dissenting opinion that the integrity of the Extraordinary Grand Jury proceeding was seriously compromised and perhaps totally subverted by the untoward tactics and techniques employed by the two assistant prosecutors who presented the case against appellant and the other defendants to that body.. Specifically, the dissenter pointed out, inter alia, that (1) more than 61 pages of testimony was adduced by the prosecutor's representatives from leading questions addressed mostly to the People's two principal witnesses Errico and Wilkowski (Vitale); (2) a voluminous amount of opinion testimony was extracted from the same two witnesses; (3) coercive and highly erroneous and prejudicial instructions were given; and (4) tapes and transcripts were not properly authenticated before being presented to that body (People v Rao, 53 AD2d 904, 908-914, supra).

Furthermore, as a result of a reading of the Grand Jury minutes in connection with this appeal it must also be noted, as revealed in the following colloquy, that one of the assistant prosecutors who conducted the proceeding wrongfully induced and directed appellant to violate the confidential attorney-client relationship appellant had with his supposed client, Vitale:

"Q. * * *You indicated during the course of some of your meetings with Vitale you planned a defense to his case.

"A. Yes.

"Q. And did you discuss the facts of his case with him?

"A. Yes, I did.

"Q. Would you please tell us what those facts were, as he told you?

"A. Really, I don't know, I think I would be jeopardizing Mr. Vitale when he goes to trial * * *

"Q. These proceedings are secret, and we are not an adjunct of the D.A.'s office, and they certainly won't be used against Mr. Vitale.

"A. Are you relieving me of the responsibility of client-attorney privilege, so I don't

get in any trouble with the Bar Association?

"Q. Yes, we are.

"A. Are you directing me to answer?

"Q. Yes, we are." (Emphasis supplied.)

C. Facts not previously divulged either to this court or the Extraordinary Grand Jury

The issue to which the prosecutors directed most of their attention and efforts before the Extraordinary Grand Jury was whether appellant had assisted Vitale in preparing a perjurious defense to which the latter would testify at the trial of the bogus indictment. When questioned on this issue before that body, appellant stated several times that he had told Vitale that he was not going to take the stand. Thereafter, Vitale (Wilkowski) testified before the same body that appellant had told him he should testify to a false story, to wit, that at the time and location of the staged robbery he (Vitale) had been looking for a job in nearby factories and had become the object of homosexual advances by the (bogus) complainant. However, at appellant's trial,

Vitale admitted that appellant had told him he would not take the stand at the trial and that he "might have [made] a mistake" in his Grand Jury testimony.

Moreover, revealed for the first time at appellant's trial was the fact that the Special Prosecutor had been in possession of tapes for some time which both corroborated appellant's Grand Jury testimony that he told Vitale he would not testify at the trial and also contradicted Vitale's Grand Jury testimony on that very same issue. Nevertheless, the then Special Prosecutor, demonstrating a shocking disregard for the concept of due process and simple fairness, withheld these crucial tapes from the Extraordinary Grand Jury. Specifically, a portion of a tape not played before the Grand Jury contains the following colloquy between appellant and Vitale:

"Rao, Jr.: You're not gonna take the stand. You can't testify to it.

"Vitale: I'm not gonna take the stand.

"Rao, Jr.: No, you're not taking the stand. And then, if you should take the stand, I'll bring out you're prior

> record * * * It won't make us look good, right?
>
> * * *
>
> "and I think it [the trial] will be over within a day. But, with your record, you cannot take the stand."

Finally, although not raised on appeal by appellant, it should also be mentioned that the Special Prosecutor's office practised a gross and unfair deception upon the Extraordinary Grand Jury with respect to the testimony of Mrs. Errico. As revealed at trial, Mrs. Errico had been apprehended for bribery. She agreed to "cooperate" with the Special Prosecutor only after she had been promised favorable consideration in her pending bribery case. Not only did the Special Prosecutor fail to reveal this arrangement to the Extraordinary Grand Jury as a matter reflecting on Mrs. Errico's credibility, but the prosecutors also compounded the deception by actually playing out a charade and having Mrs. Errico execute a waiver of immunity prior to her testifying before that Grand Jury.

DETERMINATION ON APPEAL

By law a prosecutor has the power, and indeed the obligation, to submit evidence to a grand jury concerning misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise (CPL 190.55). Implicit in such statutory power is the prosecutor's concomitant authority to aid and advise a grand jury in any investigation it conducts of corruption involving a public servant in the carrying out of his or her official duties. Thus I have no quarrel with the fact that the then Special Prosecutor decided that the Extraordinary Grand Jury should conduct an investigation into whether appellant, as a practising attorney, was engaged in activities relating to the Kings County criminal justice system, designed to corrupt and compromise judicial and court personnel in legal matters brought to their attention in the course of judicial business. Indeed the then Special Prosecutor, under Executive Order No. 58, promulgated by Governor Rockefeller on September 19, 1972, and pur-

suant to assignment by Attorney-General Lefkowitz, had a sworn duty to aid the Extraordinary Grand Jury in any such investigation as to possible unlawful activity in the criminal justice system. However, in this matter what is palpably evident from the record is that the duties delegated to the Special Prosecutor's office were carried out by its representatives outrageously and with an undisguised contempt for the rule of law. The prosecutors concocted fictitious crimes, falsified records, duped Supreme Court Justices properly engaged in their judicial duties and orchestrated the introduction before a grand jury of perjurious testimony of criminal activity which never occurred. None of these monstrous and patently illegal actions are or should be tolerated in a free society, particularly when practiced by those sworn to enforce the law and ferret out crime. Yet, the representatives of the Special Prosecutor's office knowingly engaged in all such acts and more in obtaining the "Vitale" indictment. In similar vein, one might well be accused of belaboring the obvious

or engaging in unnecessary rhetoric for stating that our criminal justice system is befouled and besmirched whenever law enforcement officers conduct a grand jury proceeding in which (a) the confidential attorney-client relationship is denigrated and trampled upon by a person who is himself a lawyer, (b) the criminal background of a principal witness for the People is deliberately concealed by the use of deceptive acts, (c) the introduction of competent and admissible evidence as mandated by subdivision 1 of CPL 190.65 is the exception rather than the rule, (d) exculpatory evidence directly bearing on an issue placed before the grand jury is consciously withheld from that Grand Jury and (e) erroneous, coercive and misleading instructions are given so as to control the grand jury's findings. Yet all these and other transgressions were committed by the representatives of the then Special Prosecutor in order to satiate his appetite for indictments against appellant and the two other defendants.

Simply stated, what is evident in this case is

misconduct of law enforcement agents so calculated, insidious and pervasive as to require as a matter of due process the vacating of the conviction and dismissal of the indictment (cf. United States v Russell, 411 US 423, 431-432). When we compare the actions of the law enforcement officials herein with matters where suppression of evidence was granted and indictments dismissed because a police officer erroneously but in good faith and on the spur of the moment, conducted a search without obtaining a search warrant, or perhaps because of inexperience, gave inadequate Miranda warnings, the latter situations are paled by the comparison. What we have in this instance is a pattern of prosecutorial misconduct, commencing in the spring of 1973 when the "Vitale" scenario was created, continuing and escalating for almost a year, and finally culminating in the indictments of appellant and the other defendants in May, 1974.

At oral argument before this court, respondent argued that even though the actions taken by the

representatives of the then Special Prosecutor prior to the trial of appellant may have been highly irregular and deserving of condemnation, nevertheless, the conviction should be affirmed since it was based on legally sufficient evidence adduced at trial. In particular, respondent points out that the exculpatory conversation between appellant and Vitale, withheld from the Extraordinary Grand Jury, was presented to the petit jury which nonetheless found appellant guilty of the count charging him with helping Vitale create a phony defense. What the respondent was alluding to is the following language contained in subdivision 6 of CPL 210.30:

> "210.30 Motion to dismiss indictment on ground of insufficiency of grand jury minutes; motion to inspect grand jury minutes
>
> * * *
>
> "6. The validity of an order denying any motion made pursuant to this section is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence."

In my opinion the above-quoted statutory lang-

uage has no bearing whatever on what transpired prior to the trial and conviction of appellant. Implicit under subdivision 6 is the premise that a conviction after trial upon legally sufficient evidence will not be set aside where, prior thereto, a prosecutor, although acting in good faith, inadvertently failed to make out a prima facie case before the grand jury based primarily on competent and admissable evidence. That provision, however, does not constitute a license for a prosecutor to inundate a grand jury with a massive wave of incompetent and inadmissible evidence, and knowingly withhold exculpatory evidence, as was done in this instance. Moreover, what is involved here is not merely a grand jury presentation, or a trial and conviction each set in isolation, but rather a continuing pattern of prosecutorial misconduct over a lengthy time span so egregious that appellant should never have been brought to trial. It is clear that the requirements of due process in a given case may extend to pretrial conduct of law enforcement authorities, and may also

be invoked to bar prosecution altogether where it resulted from illegal law enforcement practices (see United States v Toscanino, 500 F2d 267, 273). Due process is now viewed as requiring a court to divest itself of jurisdicition over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights (United States v Toscanino, supra, p 275).

Finally, while I take no position as to whether prior to staging the "Vitale" fantasy the Special Prosecutor had sufficient reason to conduct an inquiry into appellant's possible connection with corruption in the criminal justice system in Kings County, no evidence in that regard is discernible from a reading of the Extraordinary Grand Jury minutes (cf. People v Isaacson, 44 NY2d 511). We note that a Grand Jury need not demonstrate any reason for investigating anyone.

At no time during the Extraordinary Grand Jury presentation did the prosecutors attempt to establish

that appellant's conversation with Vitale about a possible defense to the robbery charge was in any way material to any investigation into corruption of the criminal justice system. Rather, what is evident is that in gross violation of appellant's right to due process, those conducting the proceeding took part in manufacturing a crime that never occurred, and then, before the grand jury, tailored their questions to appellant solely to entice and trap him into giving false answers. Since no indication of substantive investigative goals is demonstrated by the grand jury minutes, it is clear that we are confronted with a perjury trap of the type condemned in People v. Tyler (supra, at p 262). As my eminent former colleague, Justice J. IRWIN SHAPIRO, so aptly and eloquently pointed out in his stirring dissent when this matter was first before this court, and before it was made known to this court that exculpatory evidence had been withheld from the Extraordinary Grand Jury by the Special Prosecutor's office (Matter of Nigrone v Murtagh, 46 AD2d 343, 358, supra):

> "[B]ut the singular and undeniable fact is that these defendants in their appearance before the Grand Jury were not asked a single question with regard to any bribes. Instead, the questions they were asked were clearly and purposefully designed to get them to deny what they previously had said -- and which was contained on tapes in the possession of the Special Prosecutor -- so that they could be threatened with perjury indictments and then be 'squeezed' by him for the bribery information which he sought. Upon the argument of these applications it was admitted that before the hand-up of the instant indictments a conference was held with at least one of the defendants, seeking to accomplish that end."

Perhaps the most damning commentaries as to the true intent of the prosecutors' conduct of the Extraordinary Grand Jury proceeding were the spontaneous utterances of two of its members. Troubled by the tenor of what had transpired before them, the first one stated: "It wasn't a question. It was just a statement of judgment that I think was shared by several of us. There is very little doubt that there has been perjury committed. <u>However, we are supposed to be an anti-corruption jury, seeking corruption</u>, and in this particular case there seems

to be little corruption. Lying, yes: But it was like a setup to see whether or not a man is going to tell the truth or not. And it's a very, very difficult thing as far as I'm concerned." (Emphasis supplied.) A second grand juror thereafter reflected: "I think what's bothering some of the jurors -- I may be wrong -- is the connotation here that a trap was set. Is that true? Entrapment, I guess they call it."

It is to be hoped that this sorry episode of prosecutorial assault upon our institutions is coming to an unlamented end. It has stained not only the office from which it emanated but has also tended to taint unjustifiably and undeservedly all others who prosecute wrongdoers, while observing a sense of decency and respect for the law. Tactics such as those demonstrated by this record if not checked, are certain to encourage lawlessness and destroy cherished freedoms (People v Isaacson, 44 NY2d 511, 524, supra). As the late Mr. Justice BRANDEIS so brilliantly and with great prescience, stated in his historic dissent

in Olmstead v United States (277 US 435, 485):

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rule of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

A person charged with or suspected of the most heinous of crimes is still entitled to the fundamental fairness encompassed by the notion of due process (People v Isaacson, 44 NY2d 511, 524, supra). "Vigilante Justice" is abhorrent to our concept of jurisprudence whether the end product be a body dangling from the end of a rope, or a person charged with a crime as a result of lawless conduct on the part of

an overzealous prosecutor. The latter indeed is reprehensible since both society and the accused are victimized by one sworn to uphold the law.

Accordingly, the judgment of conviction should be reversed and the indictment dismissed.

MOLLEN, P. J., and GIBBONS, J. concur in the opinion of Mr. Justice TITONE.

COHALAN, J., dissents and votes to affirm the judgment.